

CHANG SEAN PONG EDDIE & ANOR v. TVS SCS MALAYSIA SDN BHD (FORMERLY KNOWN AS PAN ASIA LOGISTICS MALAYSIA SDN BHD)

HIGH COURT MALAYA, SHAH ALAM
TEE GEOK HOCK J
[CIVIL APPEAL NO: BA-12BNCC-4-03-2023]
20 JULY 2023

Abstract – *In a circumstance where the court has awarded special damages which has been specifically proven, it is not legally justified to award a further general damages over and above the special damages awarded.*

CIVIL PROCEDURE: *Appeal – Appeal against decision of Sessions Court – Claim for damages by company against employee and his wife for breach of fiduciary duties, duty of care and conspiracy to cause losses to company and wrongful gain to other company – Sessions Court Judge ('SJ') awarded company with general damages over and above special damages specifically proved and awarded – Whether SJ erred in principle, misapprehended facts or failed to consider relevant facts in arriving at decision – Whether court sitting as appeal court justified in disturbing SJ's decision*

DAMAGES: *Breach – Duty of care – Claim for damages by company against employee and his wife for breach of fiduciary duties and conspiracy to cause losses to company – Sessions Court Judge ('SJ') awarded company with general damages over and above special damages specifically proved and awarded – Whether SJ erred in principle, misapprehended facts or failed to consider relevant facts in arriving at decision – Whether court sitting as appeal court justified in disturbing SJ's decision*

The first appellant was the managing director of the respondent, while the second appellant was the wife of the first appellant and the director and shareholder of Cargo Elements Sdn Bhd ('CESB'). The respondent was a company formerly known as Pan Asia Logistics Malaysia Sdn Bhd ('PAL Malaysia'), a subsidiary company of Pan Asia Logistics International Pte Ltd ('PAL International'). At all material times, in exercising his duties as managing director, the first appellant was bound by the terms and conditions as enumerated under various documents, including the respondent's delegation of authority ('DOA'). Under the DOA, before the first appellant could cause the respondent to incur or commit to any expenditure, project or engagement, specifically for procuring any subcontractors, leases or rentals above SGD100,000, prior approvals must first be obtained from the Chief Financial Officer of Pan Asia Logistics Singapore Pte Ltd and the respondent's legal team. However, despite this requirement and the facts that: (i) the respondent had an existing tenancy of certain units, including unit 1.7, in a storage space known as Mapletree Logistics Hub-Shah Alam

- A ('MLHSA'), with Winning Paramount Sdn Bhd ('WPSB') as the main landlord of those units; and (ii) from an email from PAL International's Director of Supply Chain Management, which expressly informed that the first appellant was not approved to enter into any long-term tenancy agreement for fixed rented spaces, the first appellant had, between August and October 2018, caused the respondent to enter into a long-term tenancy agreement for unit 1.4 in MLHSA with CESB ('subtenant agreement').
- B According to the respondent, (i) the subtenant agreement was entered without its approval; (ii) the first appellant had coerced and exerted pressure on two of its officers to sign and witness the execution of the subtenant agreement;
- C (iii) as a result of signing the subtenant agreement, the respondent was contractually bound to pay rentals on an inflated rental rate of over 40% above market rate for unit 1.4 and on terms, including the termination terms, which were highly disadvantageous to the respondent; and (iv) in order to mitigate the unfavourable terms, the respondent had to enter into a novation agreement with WPSB and CESB. After signing the novation agreement, the respondent found out that: (i) WPSB had in fact granted CESB, in respect of unit 1.4, a pre-contract rent-free access from the period of 12 October 2018 to 31 January 2019 and a further fit-out rent-free period from 1 March 2019 to 30 April 2019 ('rent-free period'). As contended by the respondent's witnesses, prior to the signing of the subtenant agreement, these terms had never been disclosed by CESB to the respondent. The respondent, therefore, claimed that the first appellant had denied them the opportunity to secure the rent-free period from WPSB which amounted to RM235,358.92; and (ii) from a forensic report prepared by one 'Akash Rosen' ('forensic report'), all the documents of CESB leading up to the subtenant agreement were prepared by the first appellant. At the Sessions Court, the respondent filed a claim for damages against the appellants for the first appellant's breach of fiduciary duties and duty of care as an employee of the respondent and for conspiring with the second appellant to cause losses to the respondent and wrongful gain to CESB. The Sessions Court after trial awarded the respondent with, among others: (i) special damages in the amount of RM235,358.92 being the amount of loss of opportunity for the rent-free period; (ii) special damages in the amount of RM10,800 in relation to the forensic report; and (iii) general damages in the amount of RM40,000 ('SC's decision'). Aggrieved, the appellants filed an appeal in this court against the entirety of the SC's decision. The issue that arose was whether the Sessions Court Judge ('SJ') had erred in principle, misapprehended the facts or failed to take into consideration the relevant facts in arriving at the SC's decision, thus warranting the court to exercise an appellate interference.

Held (allowing appeal in part):

- I (1) It was the conclusion that the: (i) SJ's findings of fact were supported by the evidence in the case; (ii) SJ's factual decision was supported by the contemporaneous documentary evidence and forensic expert

evidence adduced during trial; and (iii) SJ's factual decision on liability was a decision which a reasonable trial judge would have made. In the circumstances, the present case fell below the 'plainly wrong' test for an appellate interference with the SJ's findings of fact and factual decision on liability. Therefore, premised on the legal principles, it was held that there was no valid or sufficient basis for this court sitting on appeal to disturb or interfere with SJ's decision on liability. Due to that, the appellants' appeal on the issue of liability was dismissed. (paras 31-35)

- (2) The SJ's assessment and award of the special damages were supported by the documentary evidence as well as the oral evidence of the witnesses. The SJ had also adequately considered both parties' evidence and submissions and had in fact rejected the majority of the respondent's claims for special damages. For this reason, the court was not satisfied that the SJ had acted on any wrong principle of law, misapprehended the facts, or failed to consider the relevant matters in assessing and awarding the special damages to the respondent. As such, premised on the legal principles, there was no valid or sufficient basis for this court sitting as an appeal court to disturb or interfere with the SJ's decision in respect of the award of special damages. (paras 37-39)
- (3) As a general rule, in a case of tortious wrong, it was only where the plaintiff who succeeded in liability and was unable to specifically prove his special damages that the court would award him with general damages. In the present case, what the SJ had awarded was the general damages of RM40,000 ('general damages') over and above the proven and awarded special damages of RM235,358.92 and RM10,800 ('special damages'). There was no legal basis for the SJ to have awarded the general damages. Since (i) the general damages awarded would offend the principle that damages are meant to compensate, and not to unjustly enrich or give a profit element to an aggrieved party; and (ii) the SJ had erred in principle by awarding the general damages over and above the special damages, the court was justified to exercise an appellate intervention. Hence, based on these reasons, the general damages of RM40,000 as awarded by the SJ was set aside. Other than that, considering that the appellants had succeeded in their appeal in part, a costs of RM4,000 subject to allocatur, was allowed. (paras 42, 45, 48-53 & 55)

Case(s) referred to:

- Collector Of Stamp Duties v. Ng Fah In & Ors* [1981] 1 MLJ 288 (*refd*)
Davies v. Powell Duffryn Associated Collieries Ltd [1942] AC 601 (*refd*)
In Re B (A Child) (FC) [2013] UKSC 33 (*refd*)
Hassan Marsom & Ors v. Mohd Hady Ya'akop [2018] 7 CLJ 403 FC (*refd*)
Kuala Terengganu Specialist Hospital Sdn Bhd & Anor v. Ahmad Thaqif Amzar Ahmad Huzairi & Other Appeals [2022] 10 CLJ 209 CA (*refd*)

- A** *Laksmana Realty Sdn Bhd v. Goh Eng Hwa* [2005] 4 CLJ 871 CA (*refd*)
Lim Choon Seng v. Lim Poh Kwee [2020] 9 CLJ 1 FC (*refd*)
Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC (*refd*)
Roshairae Abd Wahab v. Mejar Mustafa Omar & Ors [1997] 1 CLJ Supp 39 HC (*refd*)
Sambaga Valli KR Ponnusamy v. Datuk Bandar Kuala Lumpur & Ors And Another Appeal [2017] 1 LNS 500 CA (*dist*)
- B** *Tan Kuan Yau v. Suhindrimani Angasamy* [1985] 1 CLJ 429; [1985] CLJ (Rep) 323 FC (*refd*)
- For the appellants - Noor Syuhada Hassim; M/s Adrian, Syuhada, Sia & Assocs*
For the respondent - Trevor Padasian; M/s Skrine
- C** [Editor's note: Appeal from Sessions Court, Shah Alam; Civil Suit No: BA-B52 NCC-218-09-2019.]
- Reported by Syamim Ariffin*

JUDGMENT

D Tee Geok Hock J:

Introduction

- E** [1] The respondent/plaintiff has filed the present suit against the appellants/defendants for or damages in respect of breach of the first appellant/Chang's fiduciary duties and duty of care as employee of the respondent/plaintiff and in conspiracy with his wife the second appellant/Feng which resulted in losses to the respondent/plaintiff and wrongful gains to the second appellant/Feng's company. In the statement of claim, the respondent/plaintiff commenced the present suit against Chang and Feng
- F** claiming for, amongst others: (i) special damages amounting to RM759,439.50; (ii) further or alternatively, general damages incurred by the respondent to be assessed by this Honourable Court; (iii) pre-judgment interest on RM759,439.50 and general damages to be assessed at the rate of 5% per annum calculated from the date of payment to the date of judgment or interest at such rate and period deemed fit by this Honourable Court; and
- G** (iv) costs on a solicitor-client basis.
- H** [2] After a full trial of 11 days and after hearing 11 witnesses at the Sessions Court, the Sessions Court held that the appellants/defendants were liable to the respondent/plaintiff and the Sessions Court awarded damages on several heads of claims against the appellants/defendants as follows:
- I** (i) special damages in the amount of RM235,358.92 being the amount of loss of opportunity for the rent-free period;
- (ii) special damages in the amount of RM10,800 in relation to the forensic report;
- (iii) general damages in the amount of RM40,000;

- (iv) interest of 5% per annum on the judgment sum from the date of the filing of writ summons until the date of full payment; and A
- (v) costs of the trial is fixed at the amount of RM20,000 to be paid by the appellants to the respondent.

(See the record of appeal (Part A) (vol. 1), pp. 85 to 86 (judgment dated 22 February 2023)). B

[3] The appellants/defendants appealed against the entirety of the Sessions Court's decision.

[4] On appeal, this court on 22 June 2023 dismissed the defendants' appeal on liability issues but allowed partly the appeal on damages and quantum of damages, thereby reducing the quantum of awarded damages by ordering that the award of general damages be set aside. This court also ordered that the respondent/plaintiff shall bear the costs of appeal in the sum of RM4,000 to the appellants/defendants. C

[5] The appellants/defendants have appealed against this court's decision dated 22 June 2023 insofar as it relates to dismissal of the liability appeal and dismissal of the appeal on awards of special damages. D

Principles Of Appellate Intervention

[6] The principles on appellate interference that can be gleaned from the case authorities can be summarised as follows: E

- (i) an appellate court should not interfere with the trial judge's findings of fact unless the trial judge has erred in principle or was plainly wrong in making such findings; F
- (ii) when it comes to an evaluation, the extent to which the benefit of hearing the witnesses and watching the evidence unfold will result in the trial judge having a particular advantage over an appellate tribunal will vary from case to case. Accordingly, it is not possible to lay down any single clear general rule as to the proper approach for an appeal court to take where the appeal is against an evaluation...": per Lord Neuberger's remarks at para. 60 of *In Re B (A Child)* (FC) [2013] UKSC 33; cited with approval by Zabariah Mohd Yusof FCJ in *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1 para. [144]; G
- (iii) the mere fact that the appellate court would have come to a different conclusion on the evidence is not a ground for interference with factual decision except where the decision of the trial court was based entirely on inferences to be drawn from the proved facts (as opposed to findings which involved the issue of the credibility of the witnesses), in which case the appellate court would be placed in the I

- A same position as the trial court: per Abdul Rahman Sebli FCJ (now CJSS) in *Lim Choon Seng v. Lim Poh Kwee* [2020] 9 CLJ 1; [2020] 5 MLJ 587, para. [83];
- (iv) the principle on which an appellate court could interfere with findings of fact by the trial court is the ‘plainly wrong’ test, in the sense that the finding cannot reasonably be explained or justified and so is one which no reasonable judge could have reached; and that if the appellate court is not satisfied that the decision suffers from that infirmity, it is irrelevant that with whatever degree of certainty, it would have considered that it would have reached a different conclusion from that of the trial judge: per Abdul Rahman Sebli FCJ (now CJSS) in *Lim Choon Seng v. Lim Poh Kwee* para. [82];
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- (v) it is not sufficient for the appellate court to reverse the findings on fact merely because on a particular point of evidence, it disagreed with the conclusion made by the trial court on whether one party or the other is to be believed on the evidence that they gave in court. Although there may be inconsistencies in the evidence which could mean that another judge would have been persuaded to reach a different conclusion, this is not relevant when considering if a trial judge’s findings of fact could be overturned: per Zabariah Mohd Yusof FCJ in *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1 para. [151];
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- (vi) to justify interference with the trial judge’s findings of fact, the appellate court has to make the appropriate determination that the trial judge had gone plainly wrong in his decision, in the sense that it could not reasonably be explained or justified and so was one which no reasonable judge could have reached. Unless the conclusion that the trial judge drew from it was one that no reasonable judge would have made, his conclusion on the point should be left undisturbed: per Zabariah Mohd Yusof FCJ in *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1 para. [152];
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- (vii) rather than adopting a rigid set of rules to demarcate the boundaries of appellate intervention insofar as findings of fact are concerned, the plainly wrong test as espoused in decisions of this court should be retained as a flexible guide for appellate courts. As long as the trial judge’s conclusion can be supported on a rational basis in view of the material evidence, the fact that the appellate court feels like it might have decided differently is irrelevant. In other words, a finding of fact that would not be repugnant to common sense ought not to be disturbed. The trial judge should be accorded a margin of appreciation when his treatment of the evidence is examined by the appellate
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- courts: per Zabariah Mohd Yusof FCJ in *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1 para. [148]; A
- (viii) apart from the above examples and general statements of principles, the application of the plainly wrong test by an appeal court should be subject to any fixed or rigid guidelines: per Zabariah Mohd Yusof FCJ in *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1 para. [148]; B
- (ix) in an appeal against award of damages or compensation, the appellate court may intervene where it is satisfied that the trial judge has acted on a wrong principle of law, or has misapprehended the facts, or has for other reasons made a wholly erroneous estimate of the damages suffered: House of Lords in *Davies v. Powell Duffryn Associated Collieries Ltd* [1942] AC 601, pp. 616 to 617, followed in *Collector Of Stamp Duties v. Ng Fah In & Ors* [1981] 1 MLJ 288 at p. 292A; to be a wholly wrong estimate of the damages, the amount awarded must manifestly be either excessively high or excessively low; and C
- (x) an omission on the part of the trial judge to consider some relevant matters or he had admitted for the purpose of assessment of some irrelevant considerations or a misdirection of law are examples of having acted on a wrong principle of law or having misapprehended the facts which justifies appellate interference on the award of damages or the quantum of damages: Federal Court in *Tan Kuan Yau v. Suhindrimani Angasamy* [1985] 1 CLJ 429; [1985] CLJ (Rep) 323; [1985] 2 MLJ 22; followed by the Court of Appeal in *Laksmana Realty Sdn Bhd v. Goh Eng Hwa* [2005] 4 CLJ 871; [2006] 1 MLJ 675 at p. 682 para. [16]. D E F

Liability Issues

- [7] In our present case, the learned Sessions Court Judge found the defendants liable to the plaintiff. G
- [8] The learned Sessions Court Judge's decision on liability is, in essence, a factual decision based on his findings of fact and after having heard the evidence of witnesses and after having the advantage of observing the demeanour of the witnesses. H
- [9] In the process of making the findings of fact and in arriving at a decision on liability, the learned Sessions Court Judge has not erred in principle. I

- A [10] In the grounds of judgment, the learned Sessions Court Judge has briefly analysed the evidence of the witnesses and also the documentary evidence before coming to the factual conclusion that the defendants were liable to the plaintiff.
- B [11] The evidence including documentary evidence adduced at the trial include, among others, the items in the following paragraphs.
- C [12] The respondent which was previously known as Pan Asia Logistics Malaysia Sdn Bhd (“PAL Malaysia”) was at all material times a subsidiary company of Pan Asia Logistics International Pte Ltd (“PAL International”). (See the record of appeal (Part B) (vol. 4), p. 487 (notes of evidence dated 11 January 2022)).
- D [13] The first appellant (“Chang”) was at all material times between 1 November 2014 and 11 February 2019 an employee of the respondent and served as the managing director of the respondent. (See the record of appeal (Part C (1)) (vol. 15), pp. 1982 to 1991 (employment contract dated 22 October 2014); see the record of appeal (Part B) (vol. 8), p. 1038 (notes of evidence dated 25 May 2022); record of appeal (Part B) (vol. 8), pp. 1042 to 1043 (notes of evidence dated 25 May 2022); the record of appeal (Part B) (vol. 9), pp. 1238 and 1240 (Chang Sean Pong Eddie’s witness statement dated 30 June 2020)).
- E [14] It was testified that Chang was reporting to the Chief Executive Officer of Pan Asia Logistics Singapore Pte Ltd (“PAL Singapore”) at headquarters in Singapore, who was Gerald Tan until 27 November 2019 and was then replaced by Rickard Heiss. (See the record of appeal (Part B) (vol. 9), p. 1214 (Chin Chou Lin’s witness statement dated 30 June 2020)).
- F [15] According to the contemporaneous documentary evidence, Chang was bound by the terms and conditions contained in the employment contract dated 22 October 2014 (“employment contract”) including the two subsequent addenda attached to the employment contract, the respondent’s employee handbook (exh. P27) and the respondent’s delegation of authority dated 11 January 2018 (“DOA”). (See the record of appeal (Part B) (vol. 3), pp. 309 to 310 (notes of evidence dated 9 September 2020)).
- G [16] Under the DOA, prior approval must be obtained before any expenditure, projects or engagements of external parties could be incurred or committed. Specifically, the procurement of subcontractors, leases or rentals above SGD100,000 required the prior approval of the Chief Financial Officer of PAL Singapore and prior approval of the respondent’s legal team. (See the record of appeal (Part C (1)) (vol. 15), p. 2011 (DOA issued by PAL Singapore dated 11 January 2018)).
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- [17] It was an undisputed fact that the second appellant (“Feng”) was at all material times the wife of Chang and was a director and shareholder of Cargo Elements Sdn Bhd (“CESB”). (See the record of appeal (Part B) (vol. 7), pp. 956, 957, and 978 to 979 (notes of evidence dated 19 May 2022)). A
- [18] The search reports from SSM showed that CESB was incorporated on 10 October 2018 by Feng and Mr Navinthan a/l Vengadasamy (“Navinthan”), who was also a director and shareholder of CESB. (See the record of appeal (Part C(1)) (vol. 15), p. 1964 (company search of CESB dated 10 October 2018; see also the record of appeal (Part B) (vol. 7), pp. 973 to 974 (notes of evidence dated 19 May 2022)). B
- [19] Indisputable and cogent documentary evidence shows that Feng owned 50% of the shares in CESB and Navinthan owned the other 50% of shares in CESB. (See the record of appeal (Part C(1)) (vol. 15), p. 1965 (company search of CESB dated 10 October 2018)). C
- [20] The respondent had an existing tenancy of certain units in a storage space known as Mapletree Logistics Hub-Shah Alam (“MLHSA”), one of those units being unit 1.7. (See the record of appeal (Part B) (vol. 9), p. 1294 (Hng Jiunn Kiat’s amended witness statement dated 30 June 2020)). D
- [21] The main landlord of some of the units in MLHSA including unit 1.7 was Winning Paramount Sdn Bhd (“WPSB”). The respondent would occasionally negotiate and enter into tenancy agreements with WPSB for the MLHSA units. (See the record of appeal (Part B) (vol. 9), p. 1295 (Hng Jiunn Kiat’s amended witness statement dated 30 June 2020)). E
- [22] By email on 29 August 2018 (exh. D120), Philip Choong Siaw Chiang, PAL International’s Director of Supply Chain Management expressly informed Chang that Chang was not approved to enter into any long-term tenancy agreements for fixed rented spaces. The reason was that, at the material time, the need for storage space was only due to a temporary overflow of goods from the customer and it was not in the best interest of respondent to commit to a long-term storage given that such overflows will normalise on its own. (See the record of appeal (Part C(1)) (vol. 20), p. 2817 (email from Philip Choong Siaw Chiang to Kumarendran and cc-ed to Eddie Chang, Daniel Suresh a/l Arumugam dated 29 August 2018)). (See also the record of appeal (Part B) (vol. 9), pp. 1295 to 1296 (Hng Jiunn Kiat’s amended witness statement dated 30 June 2020)). F G
- [23] Between August 2018 and October 2018, Chang negotiated with CESB for the procurement of a long-term tenancy storage space at MLHSA (“unit 1.4”) for a term of two years at the rental rate of RM133,497.50 per month commencing on 13 October 2018. According to the respondent/plaintiff’s witnesses, this was done without the knowledge and/or prior consent of the respondent. At the trial, the defendants could not produce any documentary H I

- A evidence to show there was any consent or knowledge on the part of the respondent/plaintiff regarding such negotiations. (See the record of appeal (Part B) (vol. 8), pp. 1044, 1054 to 1055, 1056, and 1115 to 1116 (notes of evidence dated 25 May 2022)). (See also the record of appeal (Part C(1)) (vol. 18), p. 2402 and record of appeal (Part C(1)) (vol. 20), pp. 2823 to 2826
- B (email dated 12 December 2018 from Eddie Chang explaining to Rickard Heiss on the reason the sub-tenancy for unit 1.4 was taken up)).
- [24] Without the knowledge and/or prior consent of the respondent, on or about 12 October 2018, Chang caused Mr Kumarendran Subramaniam (“Kumarendran”), the senior manager operation contract logistics of the
- C respondent, to sign on Chang’s behalf the subtenant agreement dated 12 October 2018 between the respondent and CESB in respect of unit 1.4 (“subtenant agreement”). According to the respondent/plaintiff’s witness, Mr Kumarendran was coerced or unduly pressured by Chang to sign the subtenant agreement. (Exhibit D130). (See the record of appeal (Part C(1))
- D (vol. 14), pp. 1913 to 1933 (subtenant agreement dated 12 October 2018)). (See the record of appeal (Part B) (vol. 6), pp. 794, 798, and 814 (notes of evidence dated 13 May 2022). (See also the record of appeal (Part B) (vol. 8), p. 1062 (notes of evidence dated 25 May 2022)).
- [25] On or about 12 October 2018, Chang had also exerted pressure upon
- E Ms Pauline Phang Fong Ling (“Pauline”), the operation manager of the respondent, to witness the signing of the subtenant agreement by Kumarendran. (See the record of appeal (Part B) (vol. 3), p. 388 (notes of evidence dated 23 February 2021)).
- [26] As a result of the signing of the subtenant agreement, the respondent
- F was contractually bound to pay rentals and on terms which, according to the respondent/plaintiff, was an inflated rental rate of over 40% above the market rate of rental for unit 1.4 as well as highly disadvantageous termination terms. Moreover, there was no evidence of written communication about the taking up of the sub-tenancy of unit 1.4 with CESB
- G from Chang to PAL International.
- [27] In October 2018, the respondent moved into unit 1.4 and established its warehousing operations. (See the record of appeal (Part A) (vol. 1), para. 18 at p. 143 (statement of claim dated 5 August 2019)).
- H [28] To mitigate the unfavourable terms of the subtenant agreement, the respondent had to enter into a novation agreement dated 25 February 2019 (“novation agreement”) (exh. P26) in respect of unit 1.4 which was signed by WPSB as the “landlord”, CESB as the “existing tenant” and the respondent as the “substitute tenant”. (See the record of appeal (Part C(1))
- I (vol. 17), pp. 2364 to 2368 (novation agreement between CESB, WPSB, and PAL Malaysia dated 25 February 2019)). (See also the record of appeal (Part B) (vol. 9), p. 1299 (Hng Jiunn Kiat’s amended witness statement dated 30 June 2020)).

[29] WPSB had, in fact, granted CESB a pre-contract rent-free access to unit 1.4 from 12 October 2018 to 31 January 2019 and further fit out rent-free periods from 1 March 2019 to 30 April 2019 for unit 1.4. According to the plaintiff's witnesses, these terms were never disclosed to the respondent and therefore, the respondent suffered a loss of opportunity to secure a rent-free period from 1 March 2019 to 30 March 2019 from WPSB totalling RM235,358.92. (See the record of appeal (Part C(1)) (vol. 19), p. 2577 (item 12 of the First Schedule of the tenancy agreement between CESB and WPSB for unit 1.4 dated 22 January 2019)).

A

B

[30] A digital forensic reporting – final report v1.0 (Project PALM) dated 21 April 2019 (exh. P3) (“forensic report”) prepared by Akash Rosen, the founder of OG IT Forensic Services, showed that Chang was the creator and original author of various documents containing CESB’s letterhead (“CESB documents”) which were used in the transaction leading up to the subtenant agreement. (See the record of appeal (Part C(1)) (vol. 18), pp. 2369 to 2376 (forensic report prepared by Akash Rosen dated 21 April 2019)). (See the record of appeal (Part B) (vol. 4), pp. 404 to 405 (notes of evidence dated 12 March 2021)). (See also the record of appeal (Part B) (vol. 8), pp. 1066 to 1072, and 1091 to 1097 (notes of evidence dated 25 May 2022)).

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D

[31] Having perused the evidence, this court came to the conclusion that:

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(i) the learned trial judge’s findings of fact are supported by the evidence in the case;

(ii) the learned trial judge’s factual decision is also supported by contemporaneous documentary evidence and forensic expert evidence adduced at the trial; and

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(iii) the learned trial judge’s factual decision on liability is a decision which a reasonable trial judge would have made.

[32] In the circumstances, this case fell below the “plainly wrong” test for an appellate interference with the trial judge’s findings of fact and the trial judge’s factual decision on liability.

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[33] In the premises, based on the legal principles stated in para. [1] above, this court has held that there was no valid or sufficient basis for this court sitting on appeal to disturb or interfere with the learned trial judge’s decision on liability.

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[34] Even if this court were to assess and analyse the evidence afresh on a balance of probabilities as a trial judge, this court would still have come to the same conclusion as the Sessions Court Judge here.

[35] In the premises, this court found that on the liability issues and decision there is no valid or sufficient basis for an appellate intervention. As such, the appellants/defendants’ appeal on liability issues is dismissed.

I

A Damages And Quantum Issues

Special Damages

B [36] In the assessment and award of special damages, the Sessions Court Judge has not erred in principle. Neither has he misapprehended the facts nor has he failed to take into consideration the relevant facts.

C [37] The Sessions Court Judge's assessment and award of the special damages are supported by documentary evidence as well as the oral evidence of the witnesses. In his assessment and award of the special damages, the trial judge has adequately considered both parties' evidence and submissions and has, in fact, rejected a majority of the plaintiff's claims for special damages.

D [38] In the circumstances of the present case, this court is not satisfied that the trial judge has acted on any wrong principle of law, or has misapprehended the facts, or has failed to consider the relevant matters in assessing and awarding the special damages on the two items to the plaintiff.

[39] In the premises, based on the legal principles stated in para. [1] above, this court has held that there was no valid or sufficient basis for this court sitting on appeal to disturb or interfere with the learned trial judge's decision and award on special damages in the present case.

E *General Damages*

[40] In addition to the award of special damages, the trial judge has also awarded an amount of RM40,000 as general damages.

F [41] In a case of breach of contract or tort, the plaintiff who succeeds in liability will be awarded the special damages which he has specifically pleaded and specifically proved to have been caused by the breach of contract or tortious wrong.

G [42] As a general rule, it is only where the plaintiff who succeeds in liability is unable to specifically prove his special damages that the court will award him with nominal damages (for a case of breach of contract) or general damages (for a case of tortious wrong).

[43] Nominal in this context does not mean minuscule in amount, but a relatively small amount in the context of the nature and extent of the breach.

H [44] In exceptional circumstances, aggravated damages may be awarded in a case of serious and deliberate breach of contract with the intention that the wrongdoer's profits to be derived from the breach would far exceed the plaintiff's special damages. Exemplary damages are only awarded in two categories of exceptional cases: see the decision of the Federal Court in *Hassan Marsom & Ors v. Mohd Hady Ya'akop* [2018] 7 CLJ 403; [2018] 5 MLJ 141, the Federal Court referred to the case of *Rosharee Abd Wahab v. Mejar*

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Mustafa Omar & Ors [1997] 1 CLJ Supp 39. However, the nature and character of the present case here do not fall within those two exceptional categories.

A

[45] In our present case, the trial judge did not find any exceptional circumstance and also did not award any aggravated damages. What the trial judge awarded was general damages of RM40,000 over and above the special damages which was proven and awarded.

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[46] In the respondent's submission, the Court of Appeal's decision in *Sambaga Valli KR Ponnusamy v. Datuk Bandar Kuala Lumpur & Ors And Another Appeal* [2017] 1 LNS 500; [2018] 1 MLJ 784 was cited to support the Sessions Court Judge's award of RM40,000 as general damages here.

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[47] In the considered view of this court, the material facts in the Court of Appeal's decision in *Sambaga Valli v. Datuk Bandar Kuala Lumpur & Ors* can be distinguished from the facts of our present case on the following grounds:

- (i) *Sambaga Valli* case relates to a wrongful demolition of business premises and seizure of trading goods by a local authority, and not a breach of contract between two private entities;
- (ii) in *Sambaga Valli*, the plaintiff was an individual person, whereas the plaintiff in our present appeal is a limited company; and
- (iii) in *Sambaga Valli*, the Court of Appeal awarded RM55,000 for mental stress and trauma suffered by the individual plaintiff and her family due to the wrongful raid and seizure by a local authority resulting in closure of her business; here in our appeal, there is no question of a corporate plaintiff suffering mental stress and trauma.

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[48] On the facts of the present case as found by the trial judge, there is no legal basis to award RM40,000 as general damages over and above the special damages of RM235,358.92 and RM10,800 awarded.

[49] In the recent case of *Kuala Terengganu Specialist Hospital Sdn Bhd & Anor v. Ahmad Thaqif Amzar Ahmad Huzairi & Other Appeals* [2022] 10 CLJ 209, the Court of Appeal held as follows regarding the principle on assessment of damages:

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[53] Before concluding on SD, we must state that the LJ had correctly adopted the established principle on the assessment of damages that the court must be mindful that *damages serve as a compensation and are not meant to unjustly enrich the claimant nor punish the wrongdoer. The damages must be fair, adequate and not excessive based on cogent evidence before the court* (see *Yang Salbiah & Anor v. Jamil Harun* [1981] 1 LNS 106; [1981] 1 MLJ 292; *Ong Ah Long v. Dr S Underwood* [1983] 2 CLJ 198; [1983] CLJ (Rep) 300; [1983] 2 MLJ 324; *Inas Faiqah Mohd Helmi (A Child Suing Through Her Father And*

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A *Next Friend; Mohd Helmi Abdul Aziz) v. Kerajaan Malaysia & Ors* [2016] 2 CLJ 885). It is important to reiterate that damages for personal injuries are neither intended to be punitive nor a reward but purely compensatory.
(emphasis added)

B [50] Following the appellate courts' decisions on the principle on award of damages, this court has held that any award of general damages over and above the awarded special damages in the factual scenario of the present case would offend the principle that damages are meant to compensate but not to unjustly enrich or give a profit element to the aggrieved party.

C [51] In the premises, this court has held that the trial judge erred in principle in awarding RM40,000 as general damages over and above the special damages of RM235,358.92 and RM10,800 awarded.

D [52] Hence, this court sitting as an appellate court is justified in intervention insofar as the award of general damages of RM40,000 is concerned.

D [53] By reason of the above, the Sessions Court's award of RM40,000 as general damages was set aside by this court.

Conclusion

E [54] In conclusion, this court has dismissed the appellants/defendants' appeal on liability but allowed in part their appeal on quantum, and has thereby ordered that the Sessions Court Judge's award of RM40,000 as general damages be set aside. The awards on the special damages have been affirmed by this court.

F [55] As the appellants/defendants have succeeded in part of their appeal, this court has also awarded part of the costs of appeal to them, and has assessed the awarded costs at RM4,000, subject to allocatur.

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